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I. INTRODUCTION
In 1997, the U.S. Supreme Court held that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium [that is, the Internet]." *Reno v. American Civil Liberties Union*, ___ US ___, 117 S Ct 2329, 2344, 138 L Ed 2d 874 (1997). All the constitutional principles that the courts have developed over the years regarding governmental attempts to regulate expression therefore apply with full force to expression on the Internet.

II. GOVERNMENT REGULATION OF SPEECH ON THE INTERNET

A. Background: The Traditional Rules for Broadcast and Print Media
The Court has "long recognized that each medium of expression presents special First Amendment problems," *FCC v. Pacifica Foundation*, 438 US 726, 748, 98 S Ct 3026, 57 L Ed 2d 1073 (1978), with the result that some media have greater First Amendment protection than others. For example, the Court has given a greater degree of deference to governmental regulation of the broadcast media than to regulation of print media. Compare *Red Lion Broadcasting Co. v. FCC*, 395 US 367, 89 S Ct 1794, 23 L Ed 2d 371 (1969) (government may require broadcasters to present discussion of public issues and to provide "fair" coverage of each side of the issue) with *Miami Herald Pub. Co. v. Tornillo*, 418 US 241, 94 S Ct 2831, 41 L Ed 2d 730 (1974) (1971) (government may not require newspaper to give right of reply to political candidates).

B. Uncertainty: The Rules for Cable Television
With respect to cable television, the Court has said that because of "the changes taking place in the law, the technology, and the industrial structure, related to telecommunications," it has concluded that it is "unwise and unnecessary" to
determine whether that medium will be governed according to the First Amendment rules applicable to broadcast media or those applicable to print media. Denver Area Educ. Telecom. Consortium v. FCC, 518 US 727, 116 S Ct 2374, 135 L Ed 2d 888 (1996).

C. The Internet Has Full First Amendment Protection

Prior to the decision in Reno v. ACLU, ___ US ___, 117 S Ct 2329, 138 L Ed 2d 874 (1997), there was uncertainty as to which level of First Amendment protection would be applied to communications over the Internet. Defenders of free speech on the Internet were hopeful that the Supreme Court would apply the high level of protection available to the print media, but were apprehensive that the Court might choose the lower standard applicable to broadcast media. It was also possible that the Court would leave the issue unresolved, as it has done with cable television. But unlike its experience with cable television, the Court had no difficulty in determining the appropriate level of First Amendment protection for expression on the Internet, and it was unanimous in deciding that the highest level of protection should apply.

In Reno v. ACLU, the Court considered a challenge to two provisions of the Communications Decency Act of 1996 (the "CDA"). One provision, in 47 USC § 223(a)(1)(B), prohibited the knowing transmission of obscene or indecent messages over a "telecommunications device" to any recipient under 18 years of age. The other, in 47 USC § 223(d), prohibited the knowing sending or displaying of messages through "an interactive computer service" in a manner that is available to a person under 18 years of age.

After a lengthy discussion of the history and characteristics of the Internet, the Court found that "the Internet is not as 'invasive' as radio or television," and that it "can hardly be considered a 'scarce' expressive commodity." Reno v. ACLU, 117 S Ct at 2343, 2344. It concluded, as noted above, that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." Id. The Court then applied that scrutiny to the challenged provisions of the CDA and held that they both violated the First Amendment.

The holding in Reno v. ACLU does not mean that there will be no further efforts on the part of governments, at various levels, to regulate the free flow of expression on the Internet, but any such regulations will face the same high constitutional hurdles that comparable regulations of the print media face. In American Civ. Liberties Union of Georgia v. Miller, 977 F Supp 1228 (ND Ga 1997), the court preliminarily enjoined the enforcement of a Georgia statute that made it a crime to send Internet transmissions that falsely identify the sender or that use trade names or logos which would falsely state or imply that the sender was legally authorized to use them. The court held that the statute was both vague and overbroad. On the other hand, in Urofsky v. Gilmore, 167 F3d 191 (4th Cir 1999), rev'g Urofsky v. Allen, 995 F Supp 634 (ED Va 1998), the court held that a Virginia statute that provided that "no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content" did not violate the First Amendment, because the state was merely regulating the
activities of its employees as employees, not as citizens.

State laws attempting to regulate communication on the Internet may also be vulnerable to challenges under the Commerce Clause; see American Librarians Ass'n v. Pataki, 969 F Supp 160 (SDNY 1997) (noted in Section VI(B), below).

D. Public Schools and Libraries: The Perennial Battleground

Because it is a crime in Oregon, as in most states, to furnish obscene materials to a minor (ORS 167.065), public schools may legitimately block access by their minor students to Web sites that offer obscene material. That is not true, however, at the college level. When the University of Oklahoma attempted, briefly, to block access to a number of Web sites through the University's central computer, a professor immediately filed suit to challenge the policy. His action was dismissed when the University adopted a new policy, under which it maintains two servers, one allowing access only to Web sites that have not been disapproved by the University, and the other allowing access to all Web sites. Use of the latter server is restricted to persons over 18 years of age. Loving v. Boren, 956 F Supp 953 (WD Okla 1997), aff'd 133 F3d 771 (10th Cir 1998).

The more active debate over the appropriate level of access to the Internet is taking place in the context of public libraries, which typically maintain computer systems that the public can use to access the Internet. No public library board in Oregon has imposed restrictions on access to any Web sites in their computer systems, but libraries in other states have done so. In the fall of 1997, the trustees of the Loudoun County, Virginia, public library adopted the nation's most restrictive Internet policy, mandating the use of censorware on terminals used by adults as well as children. A description of the sites blocked by the library can be found at http://www.spectacle.org/cs/xstop.html.

The policy was challenged in a federal court action filed by People for the American Way, the ACLU, and other groups. In April 1998, the court denied the library's motion for summary judgment. It held that the use of software to block Internet material deemed harmful to minors is subject to strict scrutiny under First Amendment, and that such blocking is analogous to removing books from library shelves. The court said that the library may not limit adults to speech that is appropriate for minors, and that the library's policy chills speech by requiring those seeking access to blocked materials to identify themselves and submit to the unfettered discretion of library officials in deciding whether to allow them access. Mainstream Loudon v. Loudoun County Library Board of Trustees, 1998 WL 164330 (ED Va 1998). In November 1998, the court granted plaintiffs' motion for summary judgment. Mainstream Loudon v. Bd. of Trustees of Loudoun, 24 F Supp 2d 552 (ED Va 1998).

PRACTICE TIP: Information on the status of the Loudoun County library case, as well as other legislative and judicial developments involving free speech issues on the Internet, may be found at the ACLU's "cyber-liberties" site, http://www.aclu.org/issues/cyber/hmcl.html. The ACLU also disseminates by e-mail a weekly Cyber-Liberties Update that contains a great deal of information on current developments in this area. Persons who wish to subscribe may send an e-
mail message to "majordomo@aclu.org" with "subscribe Cyber-Liberties" in the body of the message. Another useful Web site, maintained by the Center for Democracy and Technology, a non-profit organization concerned with free speech on the Internet, may be found at http://www.cdt.org. Additional background information about censorship on the Internet may be found in Jonathan Wallace and Mark Mangan, Sex, Laws and Cyberspace (1996), noted at http://www.spectacle.org/freespch/.

III. FREE SPEECH RIGHTS UNDER THE FIRST AMENDMENT: SOME BASIC PRINCIPLES

A. The First Amendment Applies to All Levels of Government
The Free Speech Clause of the First Amendment to the U. S. Constitution provides that "Congress shall make no law *** abridging the freedom of speech ***." Although directed by its terms to Congress, the clause applies equally to the executive branch (e.g., Bernstein v. U.S. Dept. of State, 974 F Supp 1288 (ND Cal 1997)), and to the judicial branch (e.g., Oregonian Pub. v. U.S. Dist. Court for Dist. of Or., 920 F2d 1462 (9th Cir 1990)). The clause is fully applicable to state and local governments through the Due Process Clause of the Fourteenth Amendment. 44 Liquormart, Inc. v. Rhode Island, 517 US 484, 116 S Ct 1495, 1501 n 1, 134 L Ed 2d 711 (1996).

B. First Amendment Protections Are Not Absolute
First Amendment protection for speech is not absolute. The Supreme Court has traditionally afforded the highest level of protection to speech about governmental affairs (see, for example, Connick v. Myers, 461 US 138, 145, 103 S Ct 1684, 75 L Ed 2d 708 (1982) (speech on public issues "is more than self-expression; it is the essence of self government" and occupies the "highest rung of the hierarchy of First Amendment values")), but even that kind of speech may be subject to content-neutral time, place, and manner regulation. United States v. Grace, 461 US 171, 177, 103 S Ct 1702, 75 L Ed 2d 736 (1983).

C. Some Categories of Speech Receive Lesser or No First Amendment Protection
The Court has identified certain categories of speech (obscenity and "fighting words") that are entitled to no protection at all under the First Amendment, and other categories (commercial speech, defamation) that are entitled to substantial, but less than complete, First Amendment protection. The Court's approach to these categories is described below.

However, the fact that certain expression may fall within those categories of speech that can be "regulated because of their constitutionally proscribable content" does not make that expression "entirely invisible to the Constitution." R.A.V. v. City of St. Paul, 505 US 377, 383, 112 S Ct 2538, 120 L Ed 2d 305 (1992). "Thus, the government may proscribe libel, but it may not make the further content discrimination of proscribing only libel critical of the government." Id. (emphasis in original). In the same way, the First Amendment does not bar governments from banning obscenity, but it does bar governments from banning only obscenity that (for example) degrades women, or insults a particular religion.
IV. LIABILITY FOR PUBLISHING STATEMENTS OVER THE INTERNET

A. In Other Media, Liability for Publication Normally Depends on the Right To Exercise Editorial Control over the Publication

In most circumstances, a common carrier that has no editorial control over the content of the messages that it transmits has no liability for the content of the messages. Thus, when a person uses the telephone to make a defamatory statement about someone else, no one contends that the telephone company should be liable to the defamed person for having transmitted the statement. By the same token, if a person uses the telephone to communicate obscene speech across state lines, the federal government could not prosecute the telephone company for violating federal laws banning the interstate transmission of obscenity.

Cable television presents an anomaly in this area, as it does in others. On the one hand, public access cable television operators are barred from exercising editorial control over the content of their programming by 47 USC § 531(e). On the other hand, they may be liable for cablecasting obscenity because of the provisions of 47 USC § 559:

"Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined not more than $10,000 or imprisoned not more than 2 years, or both."

In contrast, where the transmitter of a message does exercise editorial control over the content of the message, the transmitter is clearly responsible for that content. Newspapers and magazines present the most obvious example. When a person makes an obscene statement in a letter to the editor of a newspaper, and the newspaper publishes it, the newspaper would certainly be liable for the obscenity (under federal law, that is; there can be no liability for publishing obscenity under the Oregon Constitution after State v. Henry, 302 Or 510, 732 P2d 9 (1987)).

Likewise, if a letter to the editor contains a defamatory statement, a newspaper that publishes the letter may, in the absence of an applicable privilege, be liable to the defamed person, because the newspaper publisher exercises editorial control over its content. In short, under the common law of defamation, and under criminal laws relating to obscenity, liability for the "publication" of the message depends upon the existence of a right to exercise editorial control over the message.

B. Rules Applicable to the Internet: Federal Law Immunizes Internet Service Providers from Liability for the Content of Messages

1. The Early Years: Split of Authority

Who is a publisher on the Internet? There is no question that the author of a communication who posts it on the Internet will be responsible for its content, and can be held liable if the content violates any applicable criminal law or tortiously injures someone. But what of the carrier of the communication?

In the first court decision on this point, the court in Cubby, Inc. v. CompuServe,
Inc., 776 F Supp 135 (SD NY 1991), held that CompuServe could not be liable for defamatory statements posted within an electronic segment called Rumorville USA, a component of a daily newsletter operated by Don Fitzpatrick Associates. Fitzpatrick had signed a contract with CompuServe, accepting "total responsibility for the contents" of material posted on its site. CompuServe had no knowledge of the allegedly defamatory material and no opportunity to exert editorial control over it. The court said that CompuServe, like a bookstore owner, was a passive distributor that could not be held liable for libelous material in its "store" (that is, its "electronic library"), so long as the material was provided by third parties and CompuServe neither knew nor had reason to know of the defamatory content.

The result in the next case, however, was different. In Stratton Oakmont, Inc. v. Prodigy Services Co., 23 Media L Rptr (BNA) 1794, 1995 WL 323710, motion to vacate denied 24 Media L Rptr (BNA) 1127, 1995 WL 805178 (NY Sup 1995), a New York state trial judge found Prodigy liable for defamatory statements made by subscribers on MoneyTalk, one of its monitored bulletin boards. The court ruled that since Prodigy exercised editorial control over the content of its bulletin boards, it was responsible for that content in the same way that a newspaper publisher would be for the contents of a letter to the editor or advertisement written by someone with no connection to the newspaper.

2. Congress Resolves the Issue

The issue raised by the Cubby and Stratton Oakmont cases was resolved by Congress in another section of the same act that was at issue in Reno v. ACLU, supra, 117 S Ct 2329. Section 230 of the CDA, 47 USC § 230, provides, in part:

"No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

Under this provision, an on-line carrier cannot be sued for transmitting messages posted by its members. The leading case is Zeran v. America Online, Inc., 129 F3d 327 (4th Cir 1997), cert denied 118 S Ct 2341, 141 LEd2d 712 (1998). An unidentified person posted a message on an AOL electronic bulletin board advertising t-shirts and other items with tasteless and offensive slogans relating to the bombing of the Oklahoma City federal building. Readers were instructed to call "Ken" at the plaintiff's home telephone number, and Zeran quickly began receiving angry telephone calls. He brought a negligence action against AOL, arguing that AOL had unreasonably delayed in removing the messages and refused to post retractions. The court held that section 230 of the CDA "plainly immunizes computer service providers like AOL from liability for information that originates with third parties," and affirmed the trial court's dismissal of the case.

A similar result was reached by a Florida trial court in Doe v. America Online, Inc., 25 Media L Rptr (BNA) 2112, 1997 WL 374223 (Fla Cir Ct 1997). The court there held that AOL could not be held liable for violations of Florida's law prohibiting the sale or distribution of obscene material, or for negligence, based on a convicted child pornographer's use of one of AOL's "chat rooms" to offer indecent pictures of the plaintiff's minor son for sale. The court held that section
230 of the CDA preempts such claims.

The same result was reached in *Blumenthal v. Drudge*, 992 F Supp 44 (D DC 1998). The plaintiffs (Sidney Blumenthal, an adviser to President Clinton, and his wife) filed a libel action against Matt Drudge, a gossip columnist who gained fame through his Internet newsletter (located at www.drudgereport.com), and against AOL, which carries his column. Drudge's column of August 11, 1997, stated that Blumenthal had a history of spousal abuse; the next day Drudge retracted the statement. Plaintiffs sought to hold AOL liable as a content provider, contending that because AOL pays Drudge $3,000 per month, he is AOL's contract employee, and that section 230 of the CDA therefore does not bar their action against AOL. The trial court reluctantly granted AOL's motion to dismiss: "Because it has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor. But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others." 992 F Supp at 51-52.

There have been other efforts to avoid the application of section 230. In what may be the most unusual effort to impose liability on an on-line carrier, the plaintiff in *Haybeck v. Prodigy Services Company*, 116 F3d 465, 1997 WL 338844 (2d Cir 1997) (unpublished), sued Prodigy (on a theory not stated in the opinion), contending that Prodigy should be held liable for her contraction of the HIV virus from a Prodigy employee with whom she engaged in consensual, unprotected sex after she met him over the Internet in a Prodigy "chat room." The district court dismissed her complaint for failure to state a claim, and the Second Circuit dismissed her appeal for lack of jurisdiction, on the ground that the complaint did not properly allege diversity of citizenship.

V. PRIVATE REGULATION OF SPEECH ON THE INTERNET

A. Internet Service Providers Can Exercise Editorial Control over the Messages They Transmit.

The First Amendment does not apply to private actors, unless they can be shown to be acting under color of state law; the First Amendment "ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech." *Denver Area Educ. Telecom. Consortium v. FCC*, supra, 116 S Ct at 2383. Therefore, private companies that provide their own computer networks (as well as access to the Internet) have the right to decide what speech they will transmit, in exactly the same way that newspaper publishers have the right to decide what speech they will transmit. (See *Miami Herald Pub. Co. v. Tornillo*, 418 US 241, noted in Section II(A), supra.) The question of what communications an Internet service provider will transmit is purely a matter of contract between the provider and its customers, for the provider cannot be compelled by the government to transmit messages or to provide access to particular Web sites that it finds objectionable. (See section VI(F), infra, noting policies implemented at Harvard and by AOL with respect to the transmission of
anonymous messages.) Unlike a newspaper, however, an online service provider does not run the risk of liability for the statements of third parties transmitted over its network, because of the immunity granted by 47 USC § 230. (See section IV(B)(2).)

**B. There Is No Right of Access to an Internet Service Provider’s Network**

The contention that the First Amendment provides a "right of access" to the facilities of on-line service providers has been uniformly rejected. In *Cyber Promotions, Inc. v. American Online*, Inc., 948 F Supp 436 (ED Pa 1996), the court rejected Cyber's argument that it had a First Amendment right to send unsolicited e-mail advertisements to AOL members. When Cyber began sending such messages, AOL responded with "e-mail bombs," by which it gathered all unsolicited e-mail sent by Cyber to undeliverable AOL addresses and then sent them in a bulk transmission to Cyber's Internet service providers in order to disable them. Cyber sued AOL to stop the "bombs," and AOL sued Cyber to stop the unsolicited e-mails. AOL argued that it was a purely private company, while Cyber argued that AOL provides a public function like the company town in *Marsh v. Alabama*, 326 US 501, 66 S Ct 276, 90 L Ed 265 (1946), and was therefore required by the First Amendment to allow free access to its subscribers.

The court agreed with AOL. It held that AOL had not opened its property to the public for any essential public service, that it was not acting under color of state law, and that the First Amendment imposed no duty on it to provide a forum for anybody. The same result was reached in *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F Supp 1015 (SD Ohio 1997).

**VI. REGULATION OF VARIOUS TYPES OF SPEECH ON THE INTERNET**

**A. Commercial Speech**

In 1942, the Supreme Court held, without analysis, that commercial speech was not protected by the First Amendment. *Valentine v. Chrestensen*, 318 US 52, 62 S Ct 920, 86 L Ed 1262 (1942). In the 1970s, the Court began to retreat from that position. In *Bigelow v. Virginia*, 421 US 809, 95 S Ct 2222, 44 L Ed 2d 669 (1975), the Court held that advertisements for abortion services are protected by the First Amendment. A year later, in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 US 748, 96 S Ct 1817, 48 L Ed 2d 346 (1976), the Court held that the First Amendment protects advertisements of prescription drug prices, noting that the "consumer's interest in the free flow of commercial information *** may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *425 US at 764.*

Nevertheless, a majority of the Court continues to adhere to the view that governmental regulations of commercial speech may be justified by the "commonsense differences" between such speech and noncommercial speech. *44 Liquormart, Inc. v. Rhode Island*, 517 US 484, 116 S Ct 1495, 1505, 134 L Ed 2d 711 (1996). A majority of the Court similarly continues to apply the four-part test for evaluating such regulations set out in *Central Hudson Gas & Electric Corp. v. Public Service Comm.*, 447 US 557, 566, 100 S Ct 2343, 65 L Ed 2d
"For commercial speech to come within [First Amendment protection], [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than necessary to serve that interest."

Commercial speech disseminated by means of the Internet may therefore be regulated by the federal government (if the distribution is intended for interstate consumption) and by state and local governments in the place where the speech originates. (But see American Libraries Ass'n v. Pataki, 969 F Supp 160 (SD NY 1997), noted below in Section VI(B), striking down a New York statute regulating Internet communications on the ground that it violated the Commerce Clause of the U. S. Constitution.)

Unlike the First Amendment, Article I, section 8, of the Oregon Constitution gives exactly the same protection to commercial speech that it gives to political speech. Moser v. Frohnmayer, 315 Or 372, 845 P2d 1284 (1993). Therefore, while the First Amendment would not prevent a state from disciplining a lawyer who sends an unsolicited electronic advertisement to an automobile accident victim shortly after the accident, Florida Bar v. Went For It, Inc., 515 US 618, 115 S Ct 2371, 132 L Ed 2d 541 (1995), such communications by an Oregon lawyer directed to a resident of the State of Oregon would be fully protected. Zackheim v. Forbes, 134 Or App 548, 895 P2d 793, rev denied 322 Or 167 (1995). As with any other communication on the Internet, the author must be aware of the laws of every forum where the communication may be held to have been "published."

**B. Obscenity**

Obscenity is one of the categories of speech that is not protected by the First Amendment. Miller v. California, 413 US 15, 93 S Ct 2607, 39 L Ed 2d 419 (1973). Indictments and convictions for transmitting obscenity over the Internet are common. There can be no prosecution for possession of obscenity under Oregon law, of course, since the publication of obscenity is protected by Article I, section 8 of the Oregon Constitution. State v. Henry, 302 Or 510, 732 P2d 9 (1987). In contrast, transmission over the Internet of images of real children engaged in sexual activity, or possession of such images downloaded from the Internet, can be prosecuted under Oregon law, because the distribution and transmission of such images is not protected by Article I, section 8. State v. Stoneman, 323 Or 536, 920 P2d 535 (1996).

But what about child pornography that does not use real children? The Oregon Supreme Court in Stoneman emphasized that it was construing a specific statute, former ORS 163.680 (1987), which it interpreted as applying only to the use of actual children in the manufacture of pornography. There is no Oregon criminal statute that deals with computer-generated child pornography. However, federal law prohibits the production or sale of computer-generated child pornography or other images that appear to depict minors performing sexually explicit acts, 18
USC § 2256, and two courts have held that the federal statute does not create an unconstitutional content-specific restriction on speech. \textit{Free Speech Coalition v. Reno}, 25 Media L Rptr (BNA) 2305, 1997 WL 487758 (ND Cal 1997); \textit{United States v. Hilton}, 167 F3d 61 (1st Cir 1999), cert denied 120 S Ct 115 (1999).


Some state laws that regulate obscenity on the Internet may be invalid under the Commerce Clause of the federal constitution. In \textit{American Libraries Ass’n v. Pataki}, 969 F Supp 160 (SD NY 1997), the court held that a New York statute making it a crime to use a computer to disseminate obscene material to minors violated the Commerce Clause. It held that the law "represents an unconstitutional projection of New York law into conduct that occurs wholly outside New York. *** The Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether." 969 F Supp at 169.

\textbf{C. Threats, Harassment, and Fighting Words}

"Fighting words" are not protected by the First Amendment. \textit{Chaplinsky v. New Hampshire}, 315 US 568, 62 S Ct 766, 86 L Ed 2d 1031 (1942). A state may punish "fighting words" only if they "have a direct tendency to cause acts of violence by the person to whom individually, the remark is addressed." \textit{Gooding v. Wilson}, 405 US 518, 524, 92 S Ct 1103, 31 L Ed 2d 408 (1972).

In \textit{Planned Parenthood v. American Coalition of Life Activists}, 23 F Supp 2d 1182 (D Or 1998), the court held that an objective, speaker-based test should be applied in determining whether alleged threats posted on an Internet Web site were "true threats" for purposes of First Amendment analysis. A jury in that case subsequently found that the messages posted on the Web site were "true threats," and the court entered a judgment enjoining the defendants from publishing the messages and awarding damages against them. The case is on appeal to the Ninth Circuit.
In *U. S. v. Baker*, 890 F Supp 1375 (ED Mich 1995), aff'd sub nom. *U.S. v. Alkhabaz*, 104 F3d 1492 (6th Cir 1997), the defendant, a student at the University of Michigan, posted a story on an Internet newsgroup entitled "alt.sex.stories," and had exchanged a series of private e-mail messages with another person in Canada. The story graphically described the torture, rape, and murder of a woman who was given the name of one of the defendant's classmates at the University, and the subsequent e-mail messages expressed a sexual interest in violence against young girls. He was indicted on charges that the e-mail messages violated 18 USC § 875(c), which criminalizes the transmission "in interstate or foreign commerce [of] any communication containing any threat to kidnap any person or any threat to injure the person of another."

The district court dismissed the indictment. It held that since the statute punishes "pure speech, it necessarily implicates and is limited by the First Amendment." 890 F Supp at 1381. Under the First Amendment, only "true threats" -- that is, "unequivocal, unconditional and specific expressions of intention immediately to inflict injury" -- may be punished, id. at 1381-82, and the court concluded that the exchange of e-mail messages did not meet that standard. The Court of Appeals affirmed on statutory grounds, holding that the messages did not constitute "communication[s] containing a threat" under Section 875(c). 104 F3d at 1496. The Baker case aroused such controversy and interest on the University of Michigan campus that a graduate student has created a Web page devoted to the case, available at [http://krusty.eecs.umich.edu/people/pjswan/Baker/Jake_Baker.html](http://krusty.eecs.umich.edu/people/pjswan/Baker/Jake_Baker.html).

### D. Libel

#### 1. In General


That constitutional protection for speech about public affairs is fully applicable to speech on the Internet, of course; by the same token, all the basic principles of the common law of libel apply in the same way to communications on the Internet as they do to any other kind of communications. The important question with respect to libel on the Internet, therefore, is one of jurisdiction and choice of law. While the U.S. Supreme Court has set out certain constitutional minimums for libel actions, the laws of the various states still vary considerably with respect to some elements of a libel claim. In Oregon and Washington, for example, no punitive damages may be recovered for libel, *Wheeler v. Green*, 286 Or 99, 118, 593 P2d 777 (1979); *Farrar v. Tribune Publishing Co.*, 57 Wash. 2d 549, 358 P2d 792 (1961), but such damages are available in most other states.

#### 2. Retraction Statutes

Many states have retraction statutes, which provide persons named in allegedly
defamatory publications the opportunity to demand that the publisher publish a retraction. Most such statutes relate only to defamatory statements published in the broadcast or print media. Oregon's retraction statute, ORS 30.150, applies to "a newspaper, magazine, other printed periodical, *** radio, television, [and] motion pictures." One state court has held that a retraction statute applicable to publications in a "periodical" does not apply to statements posted on an Internet bulletin board. It's in the Cards, Inc. v. Fuschetto, 193 Wis 2d 429, 535 NW2d 11 (Wis App 1995), rev denied 537 NW2d 574 (Wis 1995).

E. Invasion of Privacy
There are four branches of the tort of invasion of privacy: intrusion into solitude, public disclosure of private facts, appropriation of name or likeness, and false light. Invasion requires a physical act of invading a private space, and does not apply to pure expression over the Internet. Communications on the Internet may constitute tortious conduct under the other three branches of the tort.

The laws governing those torts vary widely from state to state. Oregon recognizes a common law action for appropriation of one's name or likeness, Hinish v. Meier & Frank Co., 166 Or 482, 113 P2d 438 (1941), while several other states have created a statutory right of action. California, for example, provides a statutory cause of action for commercial misappropriation of a person's name, voice, signature, photograph, or likeness. Cal. Civil Code § 3344(a). Oregon does not recognize the tort of public disclosure of private facts (Anderson v. Fisher Broadcasting Co., 300 Or 452, 469, 712 P2d 803 (1986)), but it is recognized in many other American jurisdictions. Conversely, the false light branch of privacy law has been recognized in Oregon (by the Oregon Court of Appeals, that is; the Oregon Supreme Court has not recognized it, and the existence of the tort therefore remains an open question in this state), Magenis v. Fisher Broadcasting, Inc., 103 Or App 555, 798 P2d 1106 (1990), while the courts of several other states have rejected it. Howell v. NY Post, 81 NY2d 115, 596 NYS2d 350, 354, 612 NE2d 699, 703 (1993); Cain v. Hearst Corp., 878 SW2d 577 (Tex 1994); Elm Medical v RKO, 403 Mass 779, 532 NE2d 675, 681 (1989).

Two recent cases concerning the privacy of Internet users (as opposed to persons whose privacy may be invaded by Internet users) are worth noting. A widely publicized example in early 1998 was McVeigh v. Cohen, 983 F Supp 215 (D DC 1998), where the court issued a preliminary injunction to bar the Navy from expelling the plaintiff from active service after it allegedly violated his rights under the Electronic Communications Privacy Act, 18 USC § 2701 et seq., the Navy's own "Don't Ask, Don't Tell, Don't Pursue" policy, and other laws, when it discovered his sexual orientation after learning his identity as an e-mail user from AOL. (On May 13, 1998, McVeigh was promoted to master chief petty officer, the Navy's highest enlisted rank.) See also U.S. v. Charbonneau, 979 F Supp 1177, 1185 (SD Ohio 1997) (sender of e-mail may not have reasonable expectation of privacy, because the message may be forwarded without sender's knowledge to a third party; even less does a person who sends e-mail to a chat room have any expectation of privacy).

F. Anonymous and Pseudonymous Speech
"[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." McIntyre v. Ohio Elections Commission, 514 US 334, 115 S Ct 1511, 1516, 131 L Ed 2d 426 (1995) (striking down an Ohio statute that prohibited the circulation of anonymous leaflets in political campaigns). The McIntyre holding would seem to preclude any governmental prohibition on anonymous, or pseudonymous, postings on the Internet.

That does not mean, of course, that private parties may not prohibit anonymity in electronic forums controlled by them. Harvard University, for example, prohibits its students from posting anonymous messages on computers owned by it. Anne Wells Branscomb, "Anonymity, Autonomy, and Accountability: Challenges to The First Amendment in Cyberspace," 104 Yale L. J. 1639, 1643 n 11 (1995). And "America Online permits the use of pseudonyms and makes no effort to prescreen messages but reserves the right to curtail service to members who abuse the privilege by posting abusive anonymous messages." Id.

G. Cryptography
Concerns over the confidentiality of messages sent over the Internet have led to the development of various encryption systems. The growth of encryption, in turn, has raised concerns in some quarters that the use of encryption might compromise national security and foreign policy interests. Those concerns led to the promulgation of federal regulations banning the export of certain encryption products. The complex history of those regulations is set out in Bernstein v. U.S. Dept. of State, 974 F Supp 1288 (ND Cal 1997). In that case, the court held that source code for computer software encryption products is "speech" protected by the First Amendment, and that the government's regulations prohibiting the export of encryption and decryption software and technology constituted a prior restraint that violates the First Amendment. In May 1999, the Ninth Circuit the district court decision, 176 F3d 1132 (9th Cir 1999), but that court has subsequently voted to withdraw its May opinion and to hear the case en banc. 1999 WL 782073 (9th Cir September 30, 1999).

See also the warning by the Secretary of Commerce that government regulations are hindering domestic development of encryption products. 66 USLW 2640 (4/21/98).

VII. LONG-ARM JURISDICTION OVER SPEAKERS ON THE INTERNET

A. Actions Within the United States
1. The Minimum Contacts Rule
The familiar rule of long-arm jurisdiction is that a defendant must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 US 310, 316, 66 S Ct 154, 90 L Ed 95 (1945). The determination of whether minimum contacts exist "is one in which few answers will be written 'in black and white. The greys are dominant and even

In some cases, courts have upheld personal jurisdiction where the contacts were relatively insignificant. In *Keeton v. Hustler Magazine*, 465 US 770, 780-81, 104 S Ct 1473, 79 L Ed 2d 790 (1984), the Court held that even though the nonresident defendant circulated less than three percent of its magazines in the forum state, it must have reasonably anticipated answering for the truth of its publications in that forum. The Ninth Circuit applied that ruling in *Gordy v. Daily News, L.P.*, 95 F3d 829 (9th Cir 1996), holding that a federal court in California had jurisdiction in a libel action brought by a California resident over a New York newspaper that sold 18 copies in California.

In contrast, the court in *Chaiken v. VV Pub. Corp.*, 119 F3d 1018, 1028-30 (2d Cir 1997), held that there was no jurisdiction in Massachusetts in a libel action brought by Israeli residents who maintained a home in Massachusetts over an Israeli newspaper that sold four weekday and 183 Sunday copies in that state. The court distinguished Gordy on the ground that the newspaper there frequently covered events in California, regularly sent reporters there, and knew that the effects of its article would be felt there.

2. The Rule Applied to the Internet

Although it has been asserted that "a new body of jurisprudence is needed to address" questions of personal jurisdiction and the Internet (Richard S. Zempek, "Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace," 6 Albany L.J. Science & Tech. 339, 346 (1996)), traditional jurisdictional standards have proved to be sufficient to resolve all civil Internet jurisdictional issues raised so far. The "minimum contacts" rule applies to cases arising from communications on the Internet as it does to any other kind of cases, but the courts have differed in their interpretation of what constitutes a "minimum contact" with respect to Internet communications.

i. Cases Upholding Jurisdiction over Defendants Doing Business on the Internet

Where nonresident defendants use the Internet to actively solicit business in the forum state, there is usually no doubt that the forum state has personal jurisdiction over them.

• *Bochan v. LaFontaine*, ___ F Supp 2d ___, 1999 WL 343780 (ED Va 1999) (posting libelous comment to a Virginia-based USENET server was sufficient contact to support jurisdiction in Virginia. New Mexico resident who maintained web site accessible to Virginia residents amounted to regular business activity in the Virginia.

• *CompuServe, Inc. v. Patterson*, 89 F3d 1257 (6th Cir 1996) (in trademark infringement action, personal jurisdiction was proper over nonresident defendant who advertised and sold software to 12 forum residents via Internet).
• State v. Granite Gate Resorts, 568 NW2d 715 (Minn App 1997), rev granted (Minn 1997) (in deceptive trade practices case, Minnesota has jurisdiction over Nevada residents who placed advertisements on Internet, available to but not specifically directed at Minnesota residents, regarding on-line wagering services).

• Maritz, Inc. v. Cybergold, Inc., 947 F Supp 1328 (ED Mo 1996) (upholding jurisdiction in Missouri over California operator of Internet site that provided information on a forthcoming service that would charge advertisers for access to mailing list of Internet users).

• Hall v. LaRonde, 56 Cal App 4th 1342, 66 Cal Rptr 2d 399 (1997) (New York resident who did business with California resident by use of electronic mail over Internet and telephone is subject to personal jurisdiction in California).

• Zippo Manuf. Co. v. Zippo Dot Com, Inc., 952 F Supp 1119 (WD Pa 1997) (defendant had interactive Web site and contracts with 3,000 individuals and seven Internet access providers in Pennsylvania allowing them to download the electronic messages that formed the basis of the action).

• American Network, Inc. v. Access America/Connect, 975 F Supp 494 (SD NY 1997) (trademark infringement case; jurisdiction in New York upheld over competing Internet service provider in Georgia whose 7,500 customers included six in New York).

• Hasbro, Inc. v. Clue Computing Inc., 1997 WL 811983, 45 USPQ2d 1170 (D Mass 1997) (upholding jurisdiction in Massachusetts over nonresident defendant who advertised its work for a Massachusetts business on its Web site "in an effort to attract more customers" and who not only took "no measures to avoid contacts in [Massachusetts], but rather *** encouraged them").


ii. Cases Upholding Jurisdiction over Defendants with Relatively "Passive" Internet Presence.

Even the maintenance of a passive web site has in some cases been enough to subject a person to jurisdiction in a distant forum.

• Telco Communications v. An Apple A Day, 977 F Supp 404 (ED Va 1997) (action for defamation and interference with contract; jurisdiction over nonresident defendants upheld because they could reasonably foresee that press releases posted on their passive web site would be read in Virginia and have impact on plaintiff there).

• Inset Systems, Inc. v. Instruction Set, Inc., 937 F Supp 161 (D Conn 1996) (trademark dispute; maintenance by nonresident defendant of toll-free number
and advertising on the Internet, both intended to attract customers in every state, was sufficient to confer personal jurisdiction).


- **Cody v. Ward,** 954 F Supp 43 (D Conn 1997) (action under Uniform Securities Act; nonresident's transmission of fraudulent misrepresentations to resident by telephone, electronic mail, and on-line computer service talk forum constituted "tortious act within the state," and telephone calls and electronic mail messages to resident established sufficient minimum contacts to sustain jurisdiction).

- **Quality Solutions, Inc. v. Zupanc,** 1997 WL 835481 (ND Ohio 1997) (trademark infringement; jurisdiction upheld where nonresident defendant advertised in magazine circulated in Ohio, but "even more compelling" fact was its use of Internet site that "can be accessed easily" in Ohio).

**iii. Cases Finding No Jurisdiction**

Where the defendant has done nothing more than post information or advertisements available to anyone who wishes to visit a Web site, the courts have generally held that there is no jurisdiction in any forum other than the defendant's home.

- **Millenium Enterprises, Inc. v. Millenium Music,** CV 98-1058-AA (D Or January 1999) (unreported). In a trademark infringement case brought in Oregon against a South Carolina music retailer who used the same name as Oregon company, Magistrate Stewart issued a 41-page opinion analyzing Internet jurisdiction. She dismissed the case for lack of jurisdiction, and criticized the plaintiff's lawyer for trying to manufacture jurisdiction by having someone buy a CD in Oregon from defendant's website.

- **ESAB Group v. Centricut,** LLC, 34 F Supp 2d 323 (D SC 1999) (patentee brought action against out-of-state corporation, alleging infringement of patent; held, (1) defendant's maintenance of a Web page viewable in South Carolina did not subject it to general personal jurisdiction; (2) defendant's single sale of allegedly infringing electrode to South Carolina corporation did not subject it to specific personal jurisdiction; and (3) maintenance of Web site was not an offer to sell infringing products in South Carolina necessary to subject it to specific personal jurisdiction).

- **Rannoch, Inc. v. Rannoch Corp.,** 52 F Supp 2d 681 (ED Va 1999) (website of Texas based promoter of steam railroad provided insufficient contact with Virginia to allow for jurisdiction under Due Process Clause).

• Cybersell, Inc. v. Cybersell, Inc., 130 F3d 414 (9th Cir 1997) (in trademark infringement case, no personal jurisdiction in Arizona over allegedly infringing Florida Web site advertiser who had no contacts with Arizona, other than maintaining home page that was accessible to Arizonans, and everyone else, over Internet).

• Smith v. Hobby Lobby Stores, Inc., 968 F Supp 1356 (WD Ark 1997) (in wrongful death action against store that sold artificial Christmas tree to which fatal house fire was attributed, store filed third-party complaint against manufacturer; court held that manufacturer's advertisement in trade publication on Internet was insufficient "contact" with Arkansas to justify personal jurisdiction).

• Bensusan Restaurant Corp. v. King, 126 F3d 25 (2d Cir 1997) (no jurisdiction in New York over Missouri resident who maintained Web site for cabaret with same name as New York jazz club; court held that defendant had not committed tortious act in New York, even if plaintiff suffered injury there).

• Mallianckrod Medical, Inc. v. Sonus Pharmaceuticals, Inc., 1998 WL 6546 (D DC 1998) (patent infringement; nonresident's act of posting message on AOL electronic bulletin board was not purposefully aimed at forum).

• Weber v. Jolly Hotels, 977 F Supp 327 (D NJ 1997) (personal injury case; defendant was Italian corporation that operated hotel in Italy where injury occurred; defendant's advertisements on Internet did not constitute "conducting business" in New Jersey; court transferred case to New York, where defendant was potentially subject to jurisdiction).


• Transcraft Corp. v. Doonan Trailer Corp., 45 USPQ2d 1097, 1997 WL 733905 (ND Ill 1997) (defendant's Web site invited e-mail inquiries but there was no evidence of such inquiries from Illinois residents).

• SF Hotel Co. v. Energy Investments, Inc., 985 F Supp 1032 (D Kan 1997) (trademark dispute; no jurisdiction in Kansas over Florida hotel operator that maintained only passive Web site providing general information about hotel).

• Copperfield v. Cogedipresse, 26 Media L. Rptr. 1185 (CD Cal 1997) (maintenance of English-language Web site and distribution of limited number of copies of magazine in California insufficient to sustain personal jurisdiction in
libel action against Paris Match, a magazine published in France).

- **Hearst Corp. v. Goldberger, 1997 WL 97097 (SD NY 1997)** (trademark infringement case; no jurisdiction in New York over nonresident whose Web site was accessible to, and had been visited by, computer users in New York, but who had not sold products or services in New York. The court said that "a finding of jurisdiction *** based on an Internet web site would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site. Such nationwide jurisdiction is not consistent with traditional personal jurisdiction case law ***." 1997 WL 97097, at *1).


- **Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F3d 1087 (8th Cir 1998)** (breweries' advertising of malt liquor on Internet was not non-Indian use of Indian land, and thus was not basis for tribal court jurisdiction).

**PRACTICE TIP:** Anyone who maintains a Web site for commercial purposes should clearly and prominently identify the jurisdiction where the person and server is located, and state that the laws of that jurisdiction govern all transactions with that Web site. Any visitor to that site will then be on notice that his or her activity at that site will be governed by the law of that jurisdiction, and the visitor can then decide whether or not to continue the transaction.

**B. Actions in Other Nations**

It is conceivable, and perhaps increasingly likely, that an Internet communicator may be sued for libel (or other causes of action) in a different country, the laws of which may offer considerably less protection to speech than those of the United States. If a resident of a different country files a lawsuit in that country against a resident of the United States for allegedly defamatory statements posted on the Internet, the American resident would not be protected by the First Amendment; in the context of the Internet, "the First Amendment is a local ordinance." Anne Wells Branscomb, "Anonymity, Autonomy, and Accountability: Challenges to The First Amendment in Cyberspace," 104 Yale Law Journal 1639, 1646 (1995) (footnote omitted).

For that reason, it may be critical for anyone who posts possibly damaging statements on the Internet to become familiar with the libel, copyright, and other applicable laws of the various jurisdictions where the communication may be read and have an impact. "The Net is not an anarchic, unregulated dominion above and beyond individual state control, but rather a terrain policed by varied, numerous, and often contradictory national laws that create a variety of regulatory fiefdoms." Mayer-Sch`nberger, Foster, "A Regulatory Web: Free Speech and the Global Information Infrastructure," 3 MICH.TEL.TECH.L.REV. 3 (1997) <http://>. The Mayer-Sch`nberger article contains helpful references to the laws of several countries that regulate obscenity, hate speech, and other forms of communication on the Internet. <http://>
Application of the laws of any nation to non-residents raises complex issues of international law, choice of law, and jurisdiction; in *Reno v. ACLU*, supra, for example, the Supreme Court noted, but did not address, the "difficult issues regarding the intended, as well as the permissible scope of, extraterritorial application of the CDA." 117 S Ct at 2348 n 45.